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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 264.

THE UNITED STATES OF AMERICA, *Appellant*,

v.

CHICAGO NORTH SHORE AND MILWAUKEE RAILROAD COMPANY, *Appellee*.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLEE.

RALPH R. BRADLEY,
CLAUDE D. CASS,
ROBERT E. QUIRK,
Solicitors for Appellee.

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Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

BRIEF FOR APPELLEE.

PROCEEDINGS IN THE LOWER COURT.

This is an appeal from the final decree of the United States District Court for the Northern District of Illinois, Eastern Division, entered March 24, 1932 (R. 65). That court wrote no opinion in this case. Its action on the case consists of comprehensive findings of fact and conclusions

of law which have not been officially reported, but which appear in the printed record. (R. 47-65.)

This suit is brought under Section 12(1) of the Interstate Commerce act to enjoin and restrain appellee from issuing any capital stock, bonds or other evidences of indebtedness, collectively termed securities, and from assuming any obligations or liabilities as guarantor, endorser, surety or otherwise, in respect of the securities of any other person or corporation unless and until appellee shall have first applied for and obtained from the Interstate Commerce Commission an order authorizing the issuance of such securities or the assumption of such obligations or liabilities. The ground of the suit is that the appellee is a common carrier by railroad as defined in Section 20a of the Interstate Commerce act, that since 1920 it has issued securities aggregating $39,000,000 without the authority of the Interstate Commerce Commission, and that unless enjoined from doing so will continue to issue securities without obtaining authority from the Commission. The appellee answered and prayed that the suit be dismissed on the ground that it is, and at all times has been, an interurban electric railway not operated as a part of a general steam railroad system of transportation, and as such is not subject to the provisions of Section 20a.

The court below granted the prayer of appellee, denied the injunction sought and dismissed the petition. In doing so it stated its conclusions of law as follows (R. 64):

> 1. The letter, as well as the spirit of the Interstate Commerce act as amended by Transportation Act, 1920, clearly excludes from section 20a of the Interstate Commerce act, and from other sections thereof, independently operated electric railways. Congress there and elsewhere in the act described these railways as street, suburban and interurban electric railways not operated as a part of a general steam railroad system of transportation, and by doing so it adopted a descriptive term which had the sanction of time and

common usage. Congress used substantially the same description in the Federal Control act, the Electric Railway Mail Pay act and in various sections of the Transportation act, 1920, and the Interstate Commerce act. The Supreme Court used the terms "interurban electric railway" in *Omaha and Council Bluffs Street Ry. Company v. I. C. C.*, 230 U. S. 324, and in *Spokane & Inland Empire R. R. Co. v. U. S.*, 241 U. S. 344. Among the common characteristics of interurban electric railways, subject to the jurisdiction of the Interstate Commerce Commission unless specifically excluded by the language of certain sections of the Interstate Commerce act, are that they use electric power in the transportation of passengers or freight or both in intrastate and interstate commerce, occupy city streets and highways in addition to private rights of way, stop cars or trains at street intersections and country highways for the reception and discharge of passengers, maintain loading platforms and shelter sheds, without agents, for passengers, have short radius curves and operate part of their system under municipal and village franchise authority and restrictions. Respondent has all of these characteristics.

2. The Court finds that the respondent is now, and has at all times since its organization been an interurban electric railway which is not operated as a part of a general steam railroad system of transportation, and that respondent is not now, and at no time since its organization has it been, a "carrier" or "corporation" within the meaning of those terms as defined in section 20a of the Interstate Commerce act, and is therefore excluded from the provisions of section 20a of that act.

JURISDICTION.

The jurisdiction of this court rests on the Expediting Act of February 11, 1903, c. 544, 32 Stat. 823 (U. S. C., Title 49, Sec. 45), as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345).

Pursuant to Rule 12 of this court appellant submitted a statement as to jurisdiction, and on October 10, 1932, the court found that probable jurisdiction had been shown.

THE QUESTION.

The question raised is whether the appellee, an independently operated electric line, is a carrier as defined in Section 20a (1) of the Interstate Commerce act. Section 20a declares that it shall be unlawful for any carrier by railroad subject to this act ("except a street suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation") to issue securities or to assume obligations without first having obtained the authorization therefor from the Interstate Commerce Commission. As stated by appellant in its brief, the sole question here is whether appellee, an independently operated electric railroad, is an "electric interurban railway," within the meaning of the excepting clause of paragraph 1 of Section 20a.

THE STATUTE.

The pertinent provisions of the Interstate Commerce act are set forth in the Appendix.

INACCURATE STATEMENTS OF FACT IN APPELLANT'S BRIEF.

Appellant's brief, contains many inaccuracies and partial statements, that are apt to mislead unless corrected. Some of them are so serious as to require the following observations:

At the bottom of page 3, appellant's brief, the statement is: "Of the total route miles of track, only 14.66 per cent represents tracks in city streets. (R. 50.)" The statement in the record, at page 50, is: "The total route miles of track operated in city streets is 20.229, which is 14.66 per cent of the total route miles of track." Obviously, if 20.229 represents route miles of track operated in city streets, and all of appellees main line is double track ex-

cept a fraction more than 5 miles then there are approximately 40 miles of track operated in city streets. (R. 50.)

At the top of page 4, appellant's brief, the fact that the tracks of the Chicago Rapid Transit Company, used by the appellee, are elevated tracks, and that such elevated tracks start at Sixty-third and Dorchester Streets on the south side of Chicago and run northerly through the Loop district, where the main Chicago passenger terminal is located, is wholly disregarded. The Chicago Rapid Transit Company operates the intramural city service over the elevated structure in Chicago and is incorporated under the General Railroad Act of Illinois. (R. 48.)

At the middle of page 4, appellant's brief, the statement is made that in Milwaukee, appellee operates a distance of 2.67 miles over the tracks of a company owned by it—the Chicago and Milwaukee Electric Railway Company; but the important point, that such operation is through the streets and that street cars also operate over the line from Harrison Street to Oklahoma Boulevard, and that such operation is under an ordinance authorizing a predecessor respondent to "operate its interurban cars" over such tracks, is wholly disregarded. (R. 49.)

In the first paragraph of appellant's brief, on page 5, reference is made to the number of miles of track in paved streets, but it refers to "appellee's total owned tracks" and disregards many miles of track in streets in the city of Milwaukee owned by the Chicago and Milwaukee Electric Railway Company, which company in turn is owned by the appellee (R. 50), and it further disregards 7.43 route miles of track in Waukegan, used in city street car service, of which 3.29 miles are also used in interurban operation. (R. 19.) The fact of the matter is that 6.58 route miles of appellee's track are laid in paved streets, 0.197 route miles are laid in unpaved portions of city streets, 2.877 route miles are laid in unpaved street area, the track zone not being used for street purposes, and in

addition the appellee owns the Chicago and Milwaukee Electric Railway Company, over which tracks it operates in the city of Milwaukee for 2.625 route miles of track in city streets, and owns and operates 7.43 route miles of track in Waukegan, of which 3.29 miles are used in interurban operation. (R. 19.)

The last paragraph on page 5 of appellant's brief makes the statement that the bridges on appellee's line are built according to steam railroad specifications and standards and "are suitable for the operation of standard freight cars of steam railroads. (R. 51.)" The facts are that the bridges "with the aid and by means of gauntlet tracks in some instances, to permit clearances, are suitable for the operation of standard freight cars of steam railroads." (R. 19.)

The last sentence in appellant's brief, on page 5, states that the load capacity of the bridges on appellee's owned main line will support the average steam railroad train, but this statement entirely disregards the further statement that "neither the viaduct used by respondent entering Milwaukee nor the elevated structure used by respondent in Chicago will support steam railroad trains" (R. 19), and further disregards the statement that "a regular train of either the Chicago and North Western or the Chicago, Milwaukee, St. Paul & Pacific could not be operated over the Shore Line between Chicago and Milwaukee" (R. 20), and also disregards the statement that "on 22.73 per cent of main line route miles, respondents cannot handle steam railroad equipment," (R. 20), and the following statement: "It is impossible for respondent to handle carload freight in standard railroad freight equipment on 31.47 route miles of track." (R. 59.)

At the top of page 6, appellant's brief, the statement is made that appellee's tracks are physically connected with those of four steam railroads at thirteen points. The statement omits a part of the same sentence, which shows con-

nections with three electric railroads at three points on its line (R. 52).

At the bottom of page 6, appellant's brief, with regard to passenger stations maintained by appellee, many essential facts have been omitted. There are 224 stations or stopping points on appellee's entire system of railroad at which it receives and discharges passengers. At 51 of these stations, agents are maintained. There are no agents at any of the other stations. The main passenger station of appellee in Chicago is in a store building on Wabash Avenue between Adams Street and Jackson Boulevard, having a front width of 25 feet and being connected with the elevated structure of the Chicago Rapid Transit Company by a bridge leading to the elevated platform above the sidewalk. All stations on the elevated structure of the Chicago Rapid Transit Company in Chicago used by appellee are used in common with the Rapid Transit Company, and appellee conducts no freight business at any of these common stations. Several of the stations used by appellee on its owned line outside of Chicago are in store buildings adjacent to track on city streets. (R. 53.)

At the top of page 7, appellant's brief, the statement is made that appellee uses 600 volts direct current for its power, but the important fact that the use of higher voltage than 600 on lines that operate over paved streets, as do lines of appellee, would create a hazardous condition for the public in the event the line broke and the wire dropped is entirely disregarded. (R. 55.) In the same paragraph of appellant's brief the statement is made that the Pennsylvania Railroad is increasing its voltage for its terminal operations at New York City, but the fact that it is increasing its voltage from 600 volts to 11,000 volts is not mentioned. (R. 55.)

The last paragraph of appellant's brief, on page 7, disregards many important facts. Of the seven electric locomotives that appellee owns, five are operated by power

transmitted from the trolley wire and two are electric storage battery locomotives. The heaviest of these locomotives is 70 tons and the lightest 50 tons, whereas of electric locomotives used on electrified sections of steam railroads the lightest, shown by evidence, is 100 tons, and the heaviest is 288 tons. The two heaviest locomotives owned by appellee will haul 1200 tons per train, three of the locomotives will haul 600 tons per train, and two will haul 400 tons per train. Steam railroads haul several thousand tons in a train. (R. 55.)

In the same last paragraph, on page 7 of appellant's brief, the statement is made that appellee has within the past five years used steam locomotives owned by it for hauling revenue freight. The facts relative to this subject are not mentioned by appellant, and they are important and show that during the period of the construction of the Skokie Valley Line and for a short time thereafter, appellee owned and used 12 steam locomotives in the construction of that line, and after its completion these locomotives were used by appellee in commercial freight business for a short period of time and then were sold, and that appellee does not now own or use any steam locomotives. (R. 20, 21.)

In the last paragraph on page 7 of appellant's brief, the statement with reference to less than carload merchandise dispatch freight and baggage type of passenger car is a half statement. The widest car is 9 feet 5½ inches, but no baggage type car wider than 9 feet can be used in the cities of Chicago and Milwaukee, as a car greater than 9 feet in width cannot operate on the tracks used by appellee in either of these cities. The capacity of these baggage type cars is from 20 to 35 thousand pounds. (R. 55.)

In the last paragraph on page 7 of appellant's brief, with reference to the ownership and use of refrigerator cars, the facts concerning these cars are entirely disregarded. Appellee owns five refrigerator cars which are

similar to merchandise dispatch cars, two of which are used exclusively for cooling and storing perishable freight. (R. 21-30.)

In the last paragraph on page 7 of appellant's brief, and the first paragraph on page 8, the statement with reference to the ownership of freight cars by appellee is a half statement. Of the 206 freight cars owned, 71 are dump cars, two are tank cars used for weed killing, five are refrigerator cars equipped with electric refrigeration, and the dump cars are occasionally used in commercial service for hauling sand, gravel and stone where necessary to dump such material along the side of the tracks or off trestles. Appellee owns 114 freight cars which can be interchanged with steam railroads, but the other freight cars are too light in construction to be accepted by steam railroads. (R. 55, 56.) Appellee owns an average of 1.49 freight cars per mile of road, while the Chicago, Milwaukee, St. Paul & Pacific owns an average of 6.29 freight cars per mile of road—the Chicago and North Western owns an average of 8.05 freight cars per mile of road—and the Minneapolis, St. Paul and Sault Ste. Marie owns an average of 5.06 freight cars per mile of road. Class I steam railroads in the United States own an average of 9.7 freight cars per mile of road. (R. 56.)

There is an obvious typographical error at the top of page 8 of appellant's brief, where the statement is made that the cars have a capacity of "eighty thousand tons." This no doubt means "eighty thousand lbs."

The second paragraph on page 8 of appellant's brief has to do with appellee's passenger equipment. Many essential facts relating to this equipment are omitted, resulting in a misleading half statement. The widest passenger car used by appellee is 9 feet and the longest is 56 feet ¾ inch, whereas the narrowest steam railroad car shown of record is 10 feet in width, and the shortest is 72 feet 7½ inches in length. Appellee's passenger equipment has 4-wheel

trucks, whereas the passenger equipment of steam railroads in general use have 6-wheel trucks. The curvatures on the line of appellee are too sharp to permit the operation of cars with 6-wheel trucks. Radial drawbars are necessary on appellee's cars to permit trains to operate around short curves, and more than 40 passenger cars of appellee are street cars which are used exclusively in street car operation. (R. 56, 57.)

The middle paragraph on page 9 of appellant's brief sets forth certain facts relating to the passenger trains and service of appellee, but again the statement omits important facts which results in the statement being misleading. The passenger service of appellee is performed in comparatively small train units ranging from a single car to four or five cars per train. There are no single car trains operated by either of the paralleling steam railroads. A substantial part of the main line passenger service of appellee is performed over tracks laid in city streets and its main line trains into and out of Chicago run over the elevated structure of the Chicago Rapid Transit Company. The speed of trains of appellee is rigidly restricted at many places by state, city, and village authority, and arbitrary stops are also required by such authority. (R. 58.) Passengers on the interurban trains of appellee to and from Waukegan are given free transfers which permit them to ride to any point on the street car system within Waukegan. (R. 50.) The Waukegan street cars use the main line tracks south from Waukegan to Great Lakes Naval Training Station in common with appellee's interurban express trains. (R. 50.)

At the top of page 10, appellant's brief, the statement is made that appellee operates its trains under rules substantially similar to the Standard Code of Train Rules of the American Railway Association, which statement disregards entirely the facts which show important and significant variations and deviations from the Standard Code

of Train Rules of the American Railway Association. Some of appellee's rules are substantially similar, but appellee's operating rules are different in many substantial respects. For example, appellee's Code of Train Rules caution motormen to exercise great care when a vehicle is being drawn ahead of or alongside of the train. Motormen and conductors must see to it that all cars are equipped with destination signs which must be displayed. Appellee does not use symbols in employees' time tables such as are used by steam railroads. Appellee does not use any through communicating signal appliances from car to car in operating trains such as are provided for in the Standard Code of Rules governing steam railroads. (R. 22.)

The paragraph at the bottom of page 10 of appellant's brief is again misleading because of omissions. Appellee derives 78 per cent of its total revenue from passenger service and 22 per cent of its total revenue from freight service, of which the greater part is derived from merchandise dispatch service performed in baggage type cars. Class I steam railroads for the United States derive about 14.7 per cent of their total revenues from passenger service and 76.6 per cent of their revenue from freight traffic. In 1928 Class I steam railroads derived more than 65.14 per cent of their total revenues from the transportation of interline freight. Appellee derives 8.47 per cent of its total revenues from the transportation of interline freight. The Interstate Commerce Commission prescribes a form for compiling freight statistics for steam railroads, which classifies the business handled into 157 commodities. During the years 1929 and 1930 appellee did not handle 56 of these commodities, while the steam railroads in the same territory handled substantially all of these commodities. Appellee handles practically no livestock, no grain, packing house products, poultry or eggs, and has no grain elevators or stockyards on its lines. (R. 60, 61.)

STATEMENT.

Appellee is a corporation organized under the General Railroad Act of Illinois (Chapter 114 Cahill's 1921 Illinois Revised Statutes). There are but two statutory enactments in Illinois under which rail carriers may be organized, one is the General Railroad Act and the other is the General Incorporation Act. The General Incorporation Act is commonly used for the organization of street railways and under it the street railway has limited powers of eminent domain. Practically all rail carriers, save street railways, organized in Illinois, are organized under the so-called General Railroad Act because of the very limited powers of eminent domain given corporations organized under the General Incorporation Act. The Chicago Rapid Transit Company, which operates the intramural city service over the elevated structure in Chicago is incorporated under the General Railroad Act of Illinois. (R. 48)

The Bluff City Electric Street Railway Company, a street railroad, was the original company out of which the properties of the appellee developed. The Bluff City line was in existence prior to 1905. On July 1, 1916, the receiver of the Chicago and Milwaukee Electric Railroad Company of Illinois and the Chicago and Milwaukee Electric Railroad Company of Wisconsin sold at receiver's sale these two properties to the Chicago North Shore and Milwaukee Railroad. As the result of a later reorganization, at 12:01 a. m. on July 1, 1923, the railroad property of that company was conveyed to the Chicago North Shore and Milwaukee Railroad Company. On October 6, 1924, this latter company was consolidated with the Chicago North Shore and Northern Railroad, an Illinois intrastate railway, under the corporate name, Chicago North Shore and Milwaukee Railroad Company, which has owned and operated the properties at all times since then. (R. 48)

The first commercially successful electric railway in the United States was a street railway which started operation

in Richmond, Va., in February, 1888. Between 1890 and 1894 there was a rapid development of electric street railways. Such lines were in operation at Chicago, Cleveland, Toronto, Indianapolis and elsewhere at that time. In the growth and development of the electrically operated railways, there were finally evolved four classes of such railways, viz: (a) street or urban railways, (b) suburban railways, (c) interurban railways and (d) electrified sections of steam railroads. (R. 17)

The appellee is not a steam railroad. It is not owned by a steam railroad. It is not operated as a part of any steam railroad system. It is not an electrified section of a steam railroad. The appellee is an electric railroad. It performs a street car service, a suburban service and an interurban service. The property of the predecessor of appellee was not taken under federal control and operation during the war. There are only four kinds or classes of electric railroads, namely, urban, suburban, interurban and electrified sections of steam railroads. There is not now and never has been any other kind of an electric railway. (R. 18)

The appellee operates a high speed electric railroad between Chicago, Ill., and Milwaukee, Wisc. Its main terminals are in Chicago and Milwaukee with branch line terminals in the cities of Waukegan, Illinois, and Mundelein, Illinois. (R. 49) The appellee has no interchange connections with steam railroads either at its terminal in Chicago or at its terminal in Milwaukee. (R. 59) It has such interchange at certain intermediate points. Its principal interchange point is Rondout, Ill. (R. 42)

The operation of appellee in Chicago is over the elevated tracks of the Chicago Rapid Transit Company from 63d and Dorchester Streets on the south side of Chicago, northerly through the Loop district, over the elevated structure to a point at Leland and Wilson Avenues on the north side of Chicago, a distance of approximately 16 miles, thence northerly through Chicago and Evanston to Wilmette, a

distance of approximately 8 miles, over elevated, dirt-fill tracks, leased from the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which is used jointly with the Rapid Transit Company. (R. 49)

The "Shore Line" of appellee continues north from Linden Avenue in Wilmette through Kenilworth, Winnetka, Glencoe, Highland Park, Highwood, Lake Forest, Lake Bluff, and North Chicago Junction, where it joins with the Skokie Valley line to Zion City and State Line, a distance of 31.77 miles. (R. 49)

The "Skokie Valley" line departs from the Shore line route at Howard Street, the north city limit of Chicago, and runs west about 3 miles to Niles Center, and thence northerly, paralleling the Shore line, to a junction with the Shore line at North Chicago Junction, a distance of 36.29 miles. (R. 49)

From State Line the road continues north via Kenosha and Racine to Harrison Street, Milwaukee, a distance of 35.92 miles. From Harrison Street the operation is through the city streets over the tracks of the Chicago and Milwaukee Electric Railway Company, which is owned by appellee, a distance of 2.67 route miles. This operation is in common with vehicular traffic and is controlled in part by "stop and go" lights, and is under an ordinance authorizing a predecessor of appellee to "operate its interurban cars" over such tracks. (R. 49)

The Libertyville branch extends from Lake Bluff on the Shore line to Rondout, Libertyville, and Mundelein, a distance of 8.8 route miles. The Waukegan branch extends from North Chicago Junction into the city of Waukegan, a distance of 3.29 miles. Appellee performs all of the street car service in Waukegan. Approximately 12 cars are used in this service. The Chicago-Waukegan interurban express trains use the street car tracks in Waukegan. The Waukegan street cars use the main line tracks south from Waukegan to Great Lakes Naval Training Station in common with

interurban express trains. The operation of street cars and of the Chicago-Waukegan interurban express trains in Waukegan is in common with other vehicular traffic on the streets. Passengers on the interurban trains of appellee to and from Waukegan are given free transfers which permit them to ride to any point on the street car system within Waukegan. (R. 49, 50)

The total route miles of main line owned and operated by the appellee is 138.38. The total miles of second track is 132.82. The total miles of yard and other track is 42.60. The total number of miles of all track is 313.81. The total route miles of track operated in city streets is 20.229, which is 14.66 per cent of the total route miles of track. Appellee operates on many of the city streets in common with street cars and vehicular traffic. (R. 50)

On 22.73 per cent of main line route miles appellee cannot handle steam railroad equipment. A regular train of either the Chicago and Northwestern or the Chicago, Milwaukee, St. Paul and Pacific cannot be operated over the Shore line between Chicago and Milwaukee. Appellee does not operate any freight trains south of East Prairie road on the Skokie Valley line. (R. 20) Appellee has many curves in its main line tracks as well as shop and yard tracks of 100 foot radius or less. This curvature in tracks is common to electric railways which must operate around street corners. Trains of steam railroads could not operate around such curves. (R. 51)

Appellee cannot handle standard freight equipment in either of its Chicago or Milwaukee terminals. It has no interchange track with steam railroads at either Chicago or Milwaukee and no reciprocal switching arrangement at either point.

Starting at 63d and Dorchester Avenue on the south side of Chicago, appellee performs no freight service for any industry or team track until it reaches McCormick Boulevard on the Skokie Valley line, 15 miles north of the Loop

district in Chicago. From that point north until the line of appellee reaches Harrison Street in Milwaukee, freight service is performed for industries and to sidings. Harrison Street is near the south limits of Milwaukee. The first freight siding on the Shore Line is near the south end of Highland Park, about 24 miles north from the Loop district in Chicago. (R. 20)

Appellee uses a baggage type of passenger car in transporting its less than carload merchandise dispatch freight (R. 55) from which it derives the greater part of its total revenue from freight service. (R. 60) Most of these cars are equipped with motors. Some are trailers. The baggage type cars wider than 9 feet are not used in the operation into the cities of Chicago and Milwaukee as a car greater than 9 feet in width cannot operate on the tracks used by respondent in either of these cities. The capacity of these cars is from 20,000 to 35,000 pounds. The average capacity of steam railroad freight cars is about 80,000 pounds, with a maximum capacity as high as 145,000 pounds. (R. 55)

Merchandise dispatch cars are used for handling less than carload shipments between most of the stations on appellee's line. This freight is handled in trains of one or more cars, usually a maximum of five cars. Most of the merchandise cars can be operated over the elevated structure in Chicago. A large portion of the operation in Chicago is from respondent's Montrose Avenue merchandise dispatch station located at Montrose Avenue and the Chicago Rapid Transit Company's right of way just west of Broadway, about 6 miles north of the Loop. (R. 21)

These merchandise dispatch cars are operated across the city of Chicago over the elevated tracks of the Rapid Transit Company to and from the station of appellee at 63d and Calumet Avenue, at the south end of the elevated system. The main merchandise receiving station of appellee is at Franklin and Austin Streets, just outside the Loop. Appellee has two other receiving stations for mer-

chandise freight at Polk and Racine Streets and at 41st and Union Avenue. (R. 21)

During the period of the construction of the Skokie Valley line and for a short time thereafter, appellee owned and used 12 steam locomotives in the construction of that line and, after its completion, these locomotives were used by respondent in commercial freight business for a short period of time and then were sold. Appellee does not now own or use any steam locomotives. It owns five refrigerator cars which are similar to the merchandise dispatch cars. Two of these refrigerator cars are used exclusively for cooling and storing perishable freight. They are not used to transport freight. Appellee's rolling equipment includes a number of ferry trucks or containers which are used to haul freight from the shipper to the appellee's depots by tractors and are then mounted on specially built flat cars to which they are fastened and are transported in that manner between Chicago and Milwaukee and between Chicago and Racine. There ferry trucks, or containers, are used for the same purpose as the container maintained by the Chicago and Northwestern Railway, but the character of the ferry trucks and the manner of handling them by the appellee are different from the container of the Chicago and Northwestern and its manner of handling such containers. (R. 21)

The track on the elevated system in Chicago from 63d and Dorchester to Leland Avenue is built on an elevated structure. All this track is third rail type transmission. (R. 21) There is a gauntlet track for a distance north of Howard Street on the tracks leased from the Chicago, Milwaukee, St. Paul and Pacific Railroad, and there the current is fed through an overhead trolley. The overhead trolley and gauntlet track are necessary to enable the Chicago Rapid Transit Company to switch certain freight cars for the Chicago, Milwaukee, St. Paul & Pacific Railroad. (R. 20) The gauntlet track is installed and used to throw

freight equipment away from the third rail. These freight trains are operated only at night when there are long intervals between passenger trains and in order to operate over these gauntlet tracks it is necessary for a brakeman to throw the switch at each end of the gauntlet. (R. 21)

Appellee's standard passenger fares are 3.6 cents per mile, the same as the standard fare generally in effect on steam railroads. The commutation fares of appellee are higher than the commutation fares of the Chicago and Northwestern. The appellee and the Chicago and Northwestern are in direct competition with each other in their through passenger service, their limited service to Waukegan, and their suburban and commuter service. Appellee also competes with busses and boat lines. (R. 22)

Appellee operates its trains under train rules adapted to its requirements. Some of these rules are substantially similar to the standard code of train rules of the American Railway Association, under which steam railroads operate. In its operation over the elevated loop tracks of the Chicago Rapid Transit Company in Chicago, appellee is governed by the rules of the Rapid Transit Company. Appellee operates its trains under train orders, clearance cards, meet orders, changes in orders, and under certain other rules as to superior and inferior trains, which are similar to the rules followed by steam railroads. But appellee's operating rules are different in many substantial respects from the standard code of train rules of the American Railway Association. Appellee's code of train rules caution motormen to exercise great care when a vehicle is being drawn ahead of or alongside of the train. Motormen and conductors must see to it that all cars are equipped with destination signs, which must be displayed. Appellee does not use symbols in employees' time tables such as are used by steam railroads. Appellee does not use any through communicating signal appliances from car to car in operating trains such as are provided for in the standard code of rules governing steam railroads. (R. 22)

The appellee has certain standards of construction and of maintenance that are adaptable to certain divisions and certain sections of divisions of its line. Appellee has standards as to the weight of rail on certain divisions, which weight is adhered to in replacement and renewals. There is no such thing as a standard road bed construction. The only thing that is standard about road bed construction is in the gauge. There are still some narrow gauge railroads. The standard of road bed construction varies considerably on different parts of the same railroad and the construction on different railroads is in many respects different. (R. 22)

Appellee's tracks entering its shops come out of the highway around very sharp curves and short switches. Neither a steam locomotive nor a steam railroad passenger car could be handled around these curves. (R. 22)

In its operation over and through city streets appellee is required to observe the municipal traffic regulations, such as "Stop and Go" signals at street intersections and at other points. (R. 22)

Appellee maintains on its entire system of railroad 224 stations or stopping points at which it receives and discharges passengers. At 51 of these stations there is a station agent who sells passenger tickets and performs other duties customarily performed by station agents. At 96 of these points the appellee maintains shelter sheds and platforms. At 35 of these points appellee maintains platforms only. At 42 points certain of the trains stop at streets or highways, where no facilities or platforms are provided. At many of the stations there are no facilities for handling freight. All passenger stations within Chicago are owned by the Chicago Rapid Transit Company and are used by appellee in common with that company. No freight business is handled at any of these stations. (R. 20)

Grades as high as 7 per cent are encountered in the main line track of appellee. The Skokie Valley line connects at

Howard Street with the Shore line and has a grade of 3 per cent at that point. It also has a grade of 1.6 over a viaduct or bridge that crosses the highway near the sanitary district plant. Appellee uses a short temporary crossover track during construction work in paved streets. All main line trains operate over these temporary crossover tracks. It would be impossible for steam line trains to use this type of crossover track. (R. 52)

The main passenger station of appellee in Chicago is in a store building having a front width of 25 feet on Wabash Avenue between Adams Street and Jackson Boulevard. This station is connected with the elevated structure of the Chicago Rapid Transit Company by a bridge leading to the elevated platform above the sidewalk. All stations on the elevated structure of the Chicago Rapid Transit Company in Chicago used by the appellee are used in common with the Rapid Transit Company. Appellee conducts no freight business at any of these stations. Several stations used by appellee on its owned line outside of Chicago are in store buildings adjacent to track on city streets. (R. 53)

Appellee owns a total of 7 electric locomotives. Two of them are electric storage battery locomotives; 5 of them are operated by power transmitted from the trolley wire. Two of these locomotives will haul 1,200 tons per train; 3 will haul 600 tons per train, and 2 will haul 400 tons per train. Steam railroads haul several thousand tons in a train. These locomotives weight 70, 60, and 50 tons, respectively. The lightest weight of electric locomotive used on electrified section of steam railroads shown by evidence is 100 tons, and the heaviest weight as much as 288 tons. (R. 55)

The Chicago, Milwaukee, St. Paul and Pacific Railroad owns an average of 6.29 freight cars per mile of road. The Chicago and Northwestern owns an average of 8.05 freight cars per mile of road. The Minneapolis, St. Paul and Sault Ste. Marie owns an average of 5.06 freight cars per mile of

road. Class 1 steam railroads in the United States own an average of 9.7 freight cars per mile of road. The North Shore owns an average of 1.49 freight cars per mile of road.

Most of the passenger and baggage car equipment of appellee is motorized. A few passenger cars have control apparatus without motors so that they may be placed ahead of motor cars in trains. The widest passenger car used by appellee is 9 feet. The longest car is 56′ 3/4″. The narrowest of steam railroad cars shown of record is 10 feet in width and the shortest in length is 72′ 7 1/2″. The passenger equipment of appellee has 4-wheel trucks. The passenger equipment of steam railroads in general use have 6-wheel trucks. The curvatures on the line of appellee are too sharp to permit the operation of cars with 6-wheel trucks. Radial draw bars are used on appellee's cars to permit trains to operate around short curves. (R. 56)

The classification of commodities prescribed by the Interstate Commerce Commission for compiling freight statistics for steam railroads includes 157 commodities. During the years 1929 and 1930 the appellee did not handle 56 of these commodities. The steam railroads in the same territory handled substantially all of these commodities. Appellee handled practically no livestock, no grain, packing-house products, poultry or eggs. Appellee has no grain elevators or stockyards on its lines. (R. 60)

Appellee derives 78 per cent of its total revenue from passenger service. Class I steam railroads for the United States derive about 14.7 per cent of their total revenues from passenger service. Appellee derives 22 per cent of its total revenue from freight service, of which the greater part is derived from the local merchandise dispatch service performed in the baggage type of cars. Class I steam railroads derive 76.6 per cent of their revenue from freight traffic. Appellee derives 8.47 per cent of its total revenues from the transportation of interline freight. Class I steam railroads derived more than 65.14 per cent of their total

revenues from the transportation of interline freight in 1928. (R. 60-61)

Appellee operates through a number of cities and towns under rights granted by franchises or ordinances. These restrictions, prohibitions, and obligations are many and varied. In all but 2 of 14 towns through which appellee operates under franchise the operation must be by electricity. In all but 3 such towns steam operation is prohibited. In 5 safety stops are required. In 8 appellee must pave the streets between its tracks. In 7 appellee must stop at street intersections. In 9 appellee must light streets and crossings. In 4 appellee must remove snow. In 2 appellee must sprinkle the streets. In 6 freight operation is prohibited. In 5 appellee must carry policemen and firemen free of charge. (R. 61)

During the calendar year 1930 the total operating revenues of appellee were $6,581,961.40. Of that amount, $4,706,855.01, or approximately 78 per cent, was derived from passenger service and the remainder, $1,384,547.58, was derived from freight service. The revenue derived from carload freight handled by appellee was 8.63 per cent of the total revenue. The revenue derived from less than carload freight was 11.47 per cent of the total revenue. The revenue from all freight, including mail, express and milk was 21.03 per cent of the total revenue. Of the revenue from carloads, 17.25 per cent was from traffic local to the appellee and 82.75 per cent was from interline traffic. Of the revenue from less than carload freight, 88.4 per cent was from local traffic and 11.58 per cent from interline traffic. Of the total revenue from freight over 60 per cent was derived from less than carload freight. (R. 23-24)

Appellee's methods of business solicitation are similar in some respects to the methods of steam railroads. It advertises in certain trade papers used by steam railroads. It is a member or associate member of certain traffic or tariff organizations to which steam railroads belong. It is a

party to tariffs which apply to traffic throughout the United States and to traffic between the United States and Canada. It maintains no off-line soliciting agents such as are maintained by steam railroads. (R. 24)

The securities issued by appellee each year since March 1, 1920, have been reported to the Interstate Commerce Commission in the annual reports of appellee filed with that commission. Each report has shown the character of business handled by appellee and has also shown that the securities have been issued with the approval and under the authority of the regulating commissions of Wisconsin and Illinois. The form of annual report prescribed by the Interstate Commerce Commission for use by electric lines requires that the character and par value of securities issued during the year be reported and that the authority under which issued be shown. In the year 1924, through inadvertence, the annual report of appellee to that commission failed to show the authority under which the securities were issued. An official of the commission directed appellee's attention to that omission by letter in January, 1926. An official of appellee advised the Commission that the securities reported in 1924 were issued under authority of the regulating commissions of Wisconsin and Illinois. (R. 24)

Prior to March, 1923, the general counsel of appellee filed a brief with the Interstate Commerce Commission in which the appellee took the position that it should be excluded from section 15a of the interstate commerce act because it was an interurban electric railroad not engaged in the general transportation of freight and not operated as a part of a general steam railroad system of transportation. On March 29, 1923, the director of the Bureau of Finance of the commission advised the general counsel that: (R. 24)

> "unless you are later advised to the contrary, this carrier will not be required to file returns in response to the commission's orders dated January 16, 1922, and

March 16, 1922, 'in the matter of the recovery and payment of excess railway operating income under the provisions of section 15a of the interstate commerce act.'" (R. 24)

On April 19, 1923, the general counsel for appellee addressed a letter to the director of the Bureau of Finance of the commission referring to the brief previously filed and the correspondence had concerning the application of section 15a to appellee. On April 25, 1923, the director of the Bureau of Finance of the Commission advised appellee that:

"unless you are later advised to the contrary, no further information will be required in connection with this order." (R. 25)

Appellee has not been advised to the contrary.

In its 35th annual report for 1921 the Commission stated that some difficulty had arisen in the construction of Section 20a in its application to electric lines and pointed out that under the law (R. 63)

"We have no jurisdiction over the issuance of securities of a 'street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation.' Certain electric railways independently operated are engaged in the general transportation of freight in interstate commerce in addition to the transportation of passengers. The use of electricity as motive power for railways is rapidly increasing. Some electric lines correspond substantially to steam roads in all important particulars except that of motive power. Under Section 15a of the act we are given authority to include in groups of carriers for rate making purposes such interurban electric lines as are engaged in the general transportation of freight. It seems desirable that Section 20a of the interstate commerce act be so amended as to indicate definitely the classes of electric railway companies subject to that section." (R. 63)

It repeated that recommendation in its annnual reports of 1923, 1924 and 1925. It made no special mention of electric railways in its annual reports of 1926 and 1927.

In its annual report for the year 1929 the Commission made the following statement: (R. 63)

> "In our annual reports to the Congress for various years since the enactment of the amendments of 1920, we have recommended that Section 20a, relating to the issuance of securities, be so amended as to apply to electric railway companies engaged in the general transportation of freight. Experience in the administration of the act, as well as changes in the conditions affecting electric railway companies, seem to require that consideration be given to the general subject of the application of various sections of the statute to those companies."

After citing the excluding language in the various sections of the Act, the Commission said in part as follows: (R. 25)

> "Practically all of the interurban electric lines of the country are engaged to a greater or less extent in the transportation of freight. Ordinarily these lines have a preponderance of passenger traffic, but the large diversion of such traffic to highways through the increasing use of automobiles has led these carriers to endeavor to recoup these losses through increased participation in freight traffic."

After commenting on the development of interurban electric lines and the varying conditions under which they operate, the Commission concluded its comment in the 1928 annual report with this recommendation: (R. 25)

> "That the present exemption provisions of paragraph (22) of section 1, paragraph (1) of section 15a, and paragraph (1) of section 20a, applicable to electric railways, *be amended by substituting provisions exempting all electric railways except such as inter-*

change standard freight equipment with steam railways, and participate in through interstate freight rates with such carriers; provision to be made for exemption of particular electric railways falling within the excepted class, if upon application they are able to show to the satisfaction of the commission, after notice and opportunity to be heard, that they are not affected with an important national interest so far as the provisions in question are concerned." (Italics ours.)

Since July, 1916, when the Chicago North Shore & Milwaukee Railroad, the immediate predecessor of appellee, acquired the properties, the appellee and predecessors have issued securities aggregating $71,327,200 par value. Of that total, $9,664,600 were issued by the predecessor company prior to March 1, 1920, and the remainder have been issued since that date. All of these securities were issued upon the authority and with the approval of the regulating commissions of Illinois and Wisconsin. There were outstanding in the hands of the public as of April 30, 1931, a total of $42,935,608.07 par value of securities issued by appellee and its predecessors. Of that amount, $4,000,000 in securities were issued prior to March 1, 1920, and $38,935,608.07 were issued since that date. There is in the treasury of the appellee or pledged under the first and refunding mortgages a total of $9,291,800 par value of securities. In December, 1930, $2,500,000 par value of securities were issued by appellee upon the authority and with the approval of the regulating commissions of Illinois and Wisconsin. All securities issued by appellee since March 1, 1920, have been reported to the Interstate Commerce Commission in the annual report of appellee filed with that commission. This report requires to be shown, and the appellee has shown, that the securities therein reported were issued under the authority and with the approval of the regulating commissions of Illinois and Wisconsin. (R. 62)

Since March 1, 1920, more than $239,000,000 par value of securities have been issued by electric railroads reporting to the Interstate Commerce Commission, other than appellee without the approval or authority of the Interstate Commerce Commission. (R. 62)

The Interstate Commerce Commission has prescribed a uniform system of accounts for electric railways, which governs the accounting system of appellee. That Commission prescribes a different and more comprehensive classification of accounts for use by steam railroads. In March, 1913, Congress enacted the valuation act, section 19a, of the interstate commerce act 37 Stat. L. 701, which requires the commission to ascertain and report the value of all property owned or used by every common carrier subject to the provisions of the act. The property of the appellee has not been valued by the commission. The commission has not reported the value of any independently operated electric railroad. The Commission has made tentative valuations or final valuations of the property of all steam railroads, subject to the interstate commerce act. (R. 62)

Since its organization appellee has been given the status of an interurban electric railway by official acts of construction by the Railroad Commission of Wisconsin, the State regulating body of Wisconsin, and by the Illinois Commerce Commission, the State regulatory body of Illinois. Each of these tribunals has assumed jurisdiction over the securities issued by appellee, of which fact the Interstate Commerce Commission has been apprised in the annual reports of the appellee to that commission. (R. 63)

Exhibits and evidence of record which correctly portray the facts show that 112 electric railways filed tariffs with the Interstate Commerce Commission, which published freight rates applicable locally to those railroads, and that of those railroads 64 participated jointly with steam railroads in interline tariff and 42 participated jointly in interline tariffs with other electric railroads during the year

1919. The Spokane Inland Empire R. R. Company, an electric line, maintained tariffs in 1911 in which it participated generally in interline freight traffic with steam railroads between points throughout the United States. The Southwest Missouri Railroad Company during the years 1927 and 1928 participated generally in interline freight traffic with steam railroads by means of published tariffs. (R. 61)

SUMMARY OF ARGUMENT.

1. It is clear from an examination of the legal history of the phrase "interurban electric railway" that Congress used it as descriptive of a class of independently operated electric railways as that phrase had the sanction of time and common usage. The court below correctly concluded as a matter of law that the phrase "street, suburban or interurban electric railway which is not operated as a part of a general steam railroad system of transportation" was used in section 20a of the Interstate Commerce Act in that sense. It is also apparent from the sense in which Congress used this phrase in section 20a and in other sections of the law that the fact that an interurban electric railroad interchanges freight and passenger traffic with steam railroads and competes for such traffic with steam and other forms of transportation would not change its character or make it any the less an interurban electric railroad. Appellee does not forfeit its character merely by complying with the duties imposed upon it by other and older provisions of the law in establishing through routes and interchange arrangements with steam railroads. *U. S. v. Munson S. S. Line*, 283 U. S. 43. There were and are only four classes of electric railways in this country, namely urban, suburban, interurban and electrified parts of steam railroads. In *Spokane & Inland Empire R. R. Co. v. U. S.*, 241 U. S. 344, the Court described the electric railroad there involved which handled freight and passenger traffic and

maintained freight and passenger rates on a national scale as an interurban electric railroad. There is striking similarity between the traffic characteristics of the Spokane line at the time of that decision and the traffic characteristics of appellee as it is today. Congress is presumed to have known of that decision and to have known that at the time of the amendments of 1920 the Interstate Commerce Commission had in numerous cases required the establishment of through routes and joint rates between interurban electric railroads and steam railroads, and that interurban electric railroads had developed at that time to the point where many or most of them engaged in a general way in the transportation of freight and passengers under through routes with steam railroads.

The court below correctly described the common characteristics of interurban electric railways as railways which use electric power in the transportation of passengers and freight, occupy city streets and highways in addition to private rights of way, stop cars or trains at street intersections and country highways for the reception and discharge of passengers, maintain loading platforms and shelter sheds without agents, have short radius curves, and operate part of their systems under municipal and village franchises, charters and restrictions, and correctly held that appellee has all of these characteristics.

2. By common consent and by contemporaneous construction of both federal and state authorities, the appellee has been described and treated as an interurban electric railway. In *Intrastate Fares of the Chicago North Shore & Milwaukee R. R. Within Illinois*, 62 I. C. C. 188, and in *Intrastate Fares of the Chicago North Shore & Milwaukee R. R. in Illinois and Wisconsin*, 136 I. C. C. 165, the Interstate Commerce Commission described the appellee as an interurban electric railroad. In its annual reports to Congress and by other informal acts the Commission has given the statute the construction relied upon by appellee. Such administrative and contemporaneous construction is en-

titled to great weight. *United States v. Minnesota,* 270 U. S. 181; *Logan v. Davis,* 233 U. S. 613; *Merritt v. Cameron,* 137 U. S. 542. Securities aggregating more than $39,000,000 have been issued in good faith by appellee from time to time with the knowledge and without objection of the Interstate Commerce Commission and under the specific authority of the regulating commissions of Wisconsin and Illinois. The acts of the regulating commissions of Wisconsin and Illinois in assuming jurisdiction by authorizing these securities are acts to which full faith and credit should be given under the Constitution and which under the doctrine of comity are entitled to highest respect. *Cooper v. Newell,* 173 U. S. 555; *Wisconsin v. Pelican Insurance Co.,* 127 U. S. 265.

3. As prior to and since the decision in *Omaha & Council Bluffs St. Ry. Co. v. I. C. C.,* 230 U. S. 324, made in June, 1913, interurban electric railroads as distinguished from street railroads have been held to be subject to the Interstate Commerce Act, Congress knew in enacting the comprehensive legislation of 1920 that interurban electric railroads would be subject to all of the provisions thereof that relate to common carriers by railroad unless specifically excluded. As independently operated electric railroads did not fall within all of the purposes sought to be reached by the new legislation or the mischief sought to be corrected, Congress excluded that class of railroads from certain of the amendments by adopting language which had the sanction of time and common usage. In giving the Commission control over the issuance of securities and over the extension and abandonment of lines, Congress was thinking in terms of steam railroads. It was well known at the time that investigations by the Commission of the financial affairs of certain important trunk lines had disclosed conditions which were deemed to be contrary to the public interest. It was also well known that many trunk lines operated through several states and that the exercise of authority by several states over the issuance of securities of such

carriers was not only cumbersome and expensive but was inadequate and brought about delay, uncertainty, and a total absence of uniformity of treatment. The reason for federal control over the securities of steam railroads did not exist as to independently operated electric railroads. Hence the exclusion of this class of railroads from section 20a and from certain other of the new provisions of the law enacted in 1920.

4. Appellee is clearly distinguishable from the Piedmont & Northern which was before the Court in *Piedmont & Northern Rwy. Co. v. I. C. C.*, 286 U. S. 299, where the Court construed the meaning of paragraphs 18 to 22, of section 1 of the Interstate Commerce Act, and held that the Piedmont & Northern was not an interurban electric railway as that phrase is used in section 1. The Court did not lay down a general rule in that case as to what constitutes an interurban electric railway within the meaning of section 1 or other sections of the Interstate Commerce Act. After making certain observations *inter alia* that the phrase "interurban electric railway" was not in 1920 commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars and that the business of the Piedmont & Northern is preeminently inte change interstate freight of national character in all essential respects conducted as is the business of steam freight carriers in the territory served, the Court concluded that the Piedmont & Northern is not an interurban electric railway. While the facts clearly distinguish the appellee from the Piedmont & Northern and while it is not necessary to argue that the particular purpose of paragraphs 18 to 22, inclusive, of section 1 is not the same as the purpose of section 20a, it is settled that the same phrase may have a different meaning in different connections in the same act, and in the *Piedmont case* the Court answered some of the contentions of the Piedmont as to the significance of the similarity of phraseology in other

sections of the act by this observation: "But it is so used with other purposes in view". *American Security Co. v. District of Columbia*, 224 U. S. 491, 494; *Alabama Midland Rwy. Co. v. I. C. C.*, 168 U. S. 144. Compare *Wight v. U. S.*, 167 U. S. 512.

6. Paragraph 11 of section 20a provides that any security issued or obligation assumed by a carrier subject to that section without the authority of the Interstate Commerce Commission shall be void, and that any such void security acquired by any person for value in good faith and without notice that it is void, entitles such person to hold the carrier and its directors, officers and attorneys jointly and severally liable for the full amount of damages sustained in a suit in any court of competent jurisdiction. Since 1920 the appellee has issued securities aggregating about $39,000,000, under state authority and without the authority of Interstate Commerce Commission, but with the knowledge and tacit sanction of that Commission. Other electric lines similarly situated have issued securities aggregating more than $239,000,000 since 1920 without the approval of the Interstate Commerce Commission and under authority of the state regulating bodies. If appellant's theory of the law be sustained, the effect under the statute if valid will be to make void the securities of the appellee and of other electric lines, the result of which may be a plethora of law suits for damages which staggers the imagination. Moreover, should the Court adopt appellant's theory of the law and hold that the appellee is not an interurban electric railway such a finding will raise for the appellee and for the whole electric railway industry a fog of uncertainty as to classification and jurisdiction which will make it impossible for any electric railway to know in advance of a decision by this Court what its status is under section 20a; and such a finding will work untold unjury to appellee and to the entire electric railway industry.

ARGUMENT.

Congress Used Phrase "Street, Suburban or Interurban Electric Railway" in Section 20a as Descriptive of a Class of Independently Operated Electric Railroads.

An examination of congressional acts dealing with electric railroads shows clearly enough that Congress used the phrase "street, suburban or interurban electric railways" as descriptive of classes of independently operated electric railways. These terms had the sanction of time and common usage. It was, therefore, quite natural for Congress to adopt them in the new provisions of the law of 1920 where it sought to exclude electric railways not operated as a part of a steam railroad system. That this is the true sense in which Congress used the phrase is apparent from the fact that in the Federal Control Act, the Railway Mail Pay Acts, the amendments of 1920 to the Interstate Commerce Act, and the Transportation Act, Congress recognized by name the only classes of electric railroads in this country, street, suburban, interurban and electrified parts of steam railroad systems.

In legislating as to common carriers by railroad, Congress adopted a distinct and fairly uniform policy with respect to electric lines. It made street, suburban or interurban electric lines subject to all of the new provisions when operated as a part of a steam railroad system. It provided that "street or interurban railways" which have their principal source of operating revenue from urban, suburban and interurban passenger traffic or the sale of power, heat or light, could not claim the benefits of the Federal Control Act or of sections 204 and 209 of the Transportation Act, and that an independently operated interurban electric railway which is not engaged in the general transportation of freight is not subject to section 15a of the Interstate Commerce Act. On the other hand, as the provisions of the law which deal with rates and charges make no distinction in steam railroads and interurban elec-

tric railroads Congress left with the Commission as complete control over the rates and charges of the one as of the other. *United States v. Village of Hubbard*, 266 U. S. 474.

The exclusion of interurban electric railways from section 20a and from other sections of the Interstate Commerce Act is in accordance with the discriminating policy shown by Congress in its treatment of various classes of common carriers since the passage of the original Act to Regulate Commerce in 1887. In the main the acts of Congress regulating common carriers have been aimed at steam railroads. It has deliberately made distinctions in various provisions of the law as between the various classes of common carriers dealt with. For example, common carrier *railroads* are required to post, publish and file their rates and tariffs. Telephone, telegraph and wireless carriers, whose rates and charges must be just and reasonable and non-discriminatory, need not publish, post or file them. Express and sleeping car companies are subject to the rule that their charges must be just, reasonable and non-discriminatory. This class of carrier is specifically excluded from section 15a.

Paragraph 11 of section 20 requires that a common carrier by *railroad* must issue a bill of lading for property and is made liable to the owner thereof for loss and damage caused by it or by any of its connections. This provision does not apply to the many other classes of common carriers which are subject to other provisions of the act. Congress has differentiated in many ways in the jurisdiction conferred on the Commission over common carriers by water. Transportation partly by railroad and partly by water when both are used in a common control, management or arrangement for through carriage, is subject to the act. Common carriers by water which are owned or controlled by a *railroad* with which they may or do compete for traffic are subject to the act, where that control or ownership is found by the Commission to be in the public

interest. Otherwise common carriers by water are not subject to the act. Car ferries are subject to the act when used as terminals for railroads.

There is nothing extraordinary in the fact that in the legislation of 1920 Congress excluded interurban electric railways from certain of the new provisions of the law which gave the Commission control over securities and more control over other matters affecting steam railroads. It has been the policy of Congress to proceed cautiously in enlarging the powers of the Commission over common carriers engaged in interstate commerce. It did not give the Commission the power to prescribe rates until 1906 and waited 33 years before it gave the Commission control over the issuance of securities and the abandonment and extension of lines of steam railroads.

The fact that in some of the statutes Congress saw fit to provide that the character of business performed by an interurban electric railroad determined whether it was subject to certain provisions of the statutes has been seized upon by the appellant as a basis for arguing that an interurban electric railroad ceases to be such when it engages in interline freight business with steam railroads, by the interchange of standard equipment or otherwise to some nebulous extent and when some of its operations are conducted in a manner similar to those of steam railroads. All railroads have some characteristics in common, whether their motive power be steam or electricity. In the *Omaha and Council Bluffs case*, 230 U. S. 324, this Court said that all recognize that

> "while there is a similarity between railroads and street railroads, there is also a difference".

There is a similarity between interurban electric railroads and steam railroads but there is also a difference. Each class has common characteristics in that each use rails and ties as road bed, they use cars to transport pas-

sengers and freight, they haul passengers, freight, mail and express, and they publish their rates and charges and interchange business with each other. Despite these common characteristics, no one in every day affairs experiences any difficulty by observation in distinguishing an interurban electric railroad from a steam railroad—no more difficulty, in fact, than would be experienced in distinguishing a horse from a mule, which also have common characteristics. No difficulty is encountered until an attempt is made to define the distinction. However, this difficulty will be minimized if instead of being guided by the things in which the interurban electric and the steam railroad are alike, one is guided by those things in which they are different. That an interurban electric railroad is different from a steam railroad cannot be questioned. These different characteristics should control the category.

The fact that street, suburban or interurban electric railways are included within section 20a and other of the new provisions of the legislation of 1920 when operated as a part of a steam railroad system of transportation is important as is the fact that even if independently operated an interurban electric railway, which is engaged in the general transportation of freight, is subject to section 15a but not on that account to section 20a and other of the amendments of 1920. This is an affirmative recognition by Congress that this class of electric railways do not lose their identity and character even when operated as a part of a steam railroad system or when engaged in the general transportation of freight.

Interurban railways as distinguished from street railways have always been subject to the provisions of the Interstate Commerce Act dealing with rates and charges and also those provisions which impose certain affirmative duties on carriers. Section 1 (4) makes it the duty of every common carrier to provide transportation (defined in paragraph 3 to include locomotives and cars, and all instrumen-

talities and facilities of shipment) upon reasonable request therefor and to establish through routes. Section 3 (3) makes it the duty of such carriers to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines without discrimination. Paragraph 10 of section 1 makes it the duty of such a carrier to provide reasonable car service including the supply, movement and interchange of locomotives and cars used in transportation. It is unnecessary to argue that an interurban electric railway does not forfeit its character as such under the act from the fact that it complies with the duties imposed upon it by the Act to establish through routes and interchange facilities for the handling of freight and passenger traffic with steam railroads and other carriers, and then proceeds to use such routes and facilities.

The court below correctly concluded as a matter of law that appellee is an interurban electric railway not operated as a part of a steam railway system of transportation and therefore comes within the excepting clause in section 20a of the Interstate Commerce Act, and that the appellee is not a carrier or corporation within the meaning of those terms as used in section 20a. The court properly stated that among the common characteristics of interurban electric railways are, (a) they use electric power in the transportation of passengers or freight, or both, in intrastate and interstate commerce, (b) they occupy city streets and highways in addition to private rights of way, (c) they stop cars or trains at street intersections and country highways for the reception and discharge of passengers, (d) they maintain loading platforms and shelter sheds without agents, (e) they have short radius curves, and (f) operate part of their systems under municipal and village franchise authority and restrictions. The court held that appellee has all of these characteristics.

Legal History of the Phrase "Interurban Electric Railway."

In order to determine the kind or class of carrier by railroad that Congress had in mind when it used the phrase "interurban electric railway," it is necessary to go back and trace the legal history of this class of railroads from the time they started to develop down to the passage of the Transportation Act, 1920. This is not a difficult thing to do. It is obvious that in the absence of subsequent legislation changing or altering the meaning of the term "interurban electric railway," it now must be construed as having the same meaning it had when Congress used it in the Transportation Act, 1920.

The Government's position is that the term interurban electric railroad describes a class of electrically operated common carriers not organized for the purpose of or actually conducting a general freight and passenger business whose operations are confined principally to the carriage of passengers in a local city movement or in local movement between cities or towns in proximity to each other. This disregards the plain facts of history as found in statutory enactment, commission and other governmental reports, court decisions, and common usage by the general public.

It is undisputed that interurban electric railways developed from electric street railways, and this development was continuous through various stages up to the time of the passage of the Transportation Act, 1920. The first official recognition of interurban electric railways as a growing and important industry is to be found in the Bureau of the United States Census Report for the year 1902. In that report, at page 3, appears the following:

> "During the past three years there has been an extraordinary development of electric railways outside the limits of cities and villages, and a considerable proportion of these suburban and interurban lines are located on private rights of way and not on the public thoroughfares."

At page 105, same report:

> "More remarkable has been the growth of freight traffic on some of the lines. The report of the railway last mentioned shows that freight earnings are increasing from 20 to 30 per cent each year."

In the Bureau of the United States Census Report for the year 1907, at page 265, appears the following:

> "One of the leading features, if not indeed the principal one, of electric railway development during the period 1902 to 1907 was the extension of the interurban electric railways which are now to be found in almost every part of the country and which in many instances, by the extent of their operations, rival main lines of steam railroads."

The development of electric railways continued, and in 1910 we find Congress for the first time dealing specifically with them in a manner different from steam railroads. Section 15 (3), 36 Stat. L. 539, as amended in 1910, gives the Commission the power to require common carriers to establish joint rates and through routes, but the section qualifies this power in the following language:

> "The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare or charge between *street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business* and railroads of a different character." (Italics ours.)

The bill out of which came the amendment to Section 15 next above referred to, as introduced in Congress provided that

> "the Commission shall not, however, establish any through route, classification or rate between street, suburban or interurban electric passenger railways and railways of a different character."

The bill containing this language went to the Committee on Interstate Commerce, and public hearings were held. In the discussions before that Committee it was shown that the phrase used was ambiguous and might be construed as excluding interurban electric railways which did a freight business. Various parties appeared before the Committee and urged that interurban electric railways performed a freight business and that such lines should be included within the Commission's power to require the establishment of joint rates and through routes. The Committee accepted this view, and as the amendment was finally adopted it left the Commission jurisdiction to prescribe joint rates and through routes between interurban electric railroads and steam railroads. (See Senate Hearings, Vol. 18, pp. 1027-1042.)

Thus, in the year 1910 Congress by statutory enactment recognized the fact that there were at that time interurban electric railroads and street railroads carrying freight and physically qualified to interchange such freight with steam railroads.

Emphasizing this fact further are decisions of the Interstate Commerce Commission based upon the power given in Section 15 (3) as amended in 1910, wherein the Commission construed that amendment as a limitation of its powers in respect of street electric passenger-carrying railroads and not as to freight carrying interurban electric railroads. *Chicago, Ottawa & Peoria Railway Company v. C. & N. W. Railway Company*, 33 I. C. C. 573. *Michigan Railroad Company v. P. M. Railroad Company*, 74 I. C. C. 496.

Since 1910 the Commission in various decisions based on Section 15 (3) as amended, has ordered the establishment of through routes and joint rates between steam railroads and freight-carrying interurban electric railroads. *Cedar Rapids & Iowa City Ry. & Light Co. v. Chicago & North Western Ry. Co.*, 13 I. C. C. 250; *St. Louis, Springfield & Peoria R. R. v. P. & P. U. Ry. Co.*, 26 I. C. C. 226.

In 1913, judicial sanction was given by the Supreme Court of the United States to the proposition that interurban electric railroads had developed from street railways and performed a different class of service. In *Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Commission,* 230 U. S. 324, decided June 9, 1913, the Court said *inter alia:*

> "But it is said that since 1887, when the act was passed, a new type of interurban railroad has been developed, which with electricity as a motive power uses larger cars and runs through the country from town to town, enabling the carrier to haul passengers, freight, express, and the mail for long distances at high speed. We are not dealing with such a case, but with a company chartered as a street railroad, doing a street railroad business, and hauling no freight."

So, then, in 1913, this Court recognized the fact that interurban railroads were common carriers of freight as well as passengers, express and mail; and further, that they operated "for long distances at high speed."

In the year 1916, an important description of an interurban electric railroad was contained in the decision of the Supreme Court of the United States in *Spokane & Inland Empire Railroad Co. v. United States,* 241 U. S. 344. The Supreme Court said:

> "The railroad company operated a street railway system in Spokane, Washington, and several *interurban electric lines,* one of which extended from Spokane to Coeur d'Alene, Idaho, a distance of about 40 miles. *Over this line passenger trains composed of two or more cars were operated, starting at a station near the center of Spokane and running for a mile and a quarter on the street railway tracks to the company's yards near the city limits, and thence over its private right of way to Coeur d'Alene. The road was standard gauge, with rails of standard weight, and the passenger trains were made up according to standard rail-*

road rules with markers to designate the trains, and were run on schedules and by train orders. Passengers traveled on tickets entitling them to ride to and from designated stations, at which regular stops were made, and express matter and baggage were carried on the passenger trains. The street-car business was entirely separate from that done by the interurban line, the employees of the one having nothing whatever to do with the other, and although stops were made by interurban trains within the city limits, and while on the street railway tracks, they were made solely for the purpose of taking on and letting off passengers to or from stations outside the city. *In addition to its passenger trains, the interurban line also operated freight trains, which, however, started from the company's yards and ran directly to Coeur d'Alene, and did not, therefore, enter upon the street railway tracks."* (Italics ours.)

In connection with the Spokane & Inland Empire decision, the record shows that at the time of the decision the freight revenues of the Spokane & Inland Empire were 20.3 per cent of its total revenues and that this interurban electric railroad had a general line of freight tariffs and transacted interline business with practically all steam railroads between all points throughout the United States.

It should be pointed out that the Supreme Court's description of the Spokane & Inland Empire is almost identical with the description of the appellee as it is today, with present freight revenues of 21.03 per cent of total operating revenues and having a general line of freight tariffs with steam railroads.

Congress was next called upon to consider the status of interurban electric railways when it passed the Federal Control Act of March 21, 1918. In that act, for the second time in statutory enactments, it used language differentiating electric railways and steam railroads as follows:

"Provided, however, that nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of

> operating revenue, urban, suburban or interurban passenger traffic, or sale of power, heat, light, or both."

By this provision Congress legislatively declared that an interurban electric railway might have freight revenues as its principal source of earnings. The fact is that several interurban electric railroads were taken under Federal control pursuant to this section of the Federal Control Act because their principal source of operating revenue was the transportation of freight. The appellee was not.

In this same year of 1918, on July 2d, Congress again for the second time in this year, and for the third time in statutory enactments, legislated specifically for electric railways and differentiated between them and steam railroads. This was the Railway Mail Pay Service on Urban and Interurban Electric Railways Act, 40 Stat. L. 748, passed on July 2, 1918. This act empowered the Commission

> "to fix and determine from time to time the fair and reasonable rates and compensation for transportation of mail matter by urban and interurban electric railway common carriers and the service connected therewith,"

and the act also contained this proviso:

> "That it shall be unlawful for any urban or interurban electric railroad to refuse to perform mail service at the rates or methods of compensation thus provided for such service when required by the Postmaster General so to do, and for such offense shall be fined one hundred dollars."

Congress had previously, in 1916, passed the Railway Mail Service Pay Act, 39 Stat. L. 412, giving the Commission the power to fix reasonable rates and compensation for the transportation of mail matter by railway common carriers.

In a case, decided in August, 1920, involving applications of electric lines for increased mail pay, entitled *Electric Railway Mail Pay,* 58 I. C. C. 455, the electric lines desiring to benefit from the higher rates established for steam railroads under Railway Mail Service Pay Act, 39 Stat. L. 412, just cited, contended before the Commission that as they were railway common carriers they were within the meaning of that term as used in the Railway Mail Service Pay Act of July 28, 1916. But the Commission held against them on account of the fact that Congress had, in July, 1918, passed a special railway mail pay act dealing with the rates of pay for the transportation of mail by urban and interurban electric railway common carriers, and therefore the electric lines before it did not come within the meaning of the phrase "railway common carriers" as used in the act of July 28, 1916, covering steam railroad mail service. The rates of mail pay received by interurban electric carriers for the transportation of mail matter were determined by the Commission in the above cited case, and in *Electric Railway Mail Pay,* 98 I. C. C. 737, and are substantially lower than the rates established for steam railroad carriers.

We are now down to the year 1920, and the Congress in that year passed the Transportation Act, which, among other things, amended the Interstate Commerce Act, as well as provided for the termination of federal control and the establishment of the Railway Labor Board. Twenty years of development and history were before the Congress at this time. Census reports, statutory enactments, decisions of the Interstate Commerce Commission, Court decisions, and common experience and general usage all contributed to the ultimate classification given to electric railways in the Transportation Act, 1920. It is a fact that numerous interurban electric railways prior to 1920 were heavy freight-carrying railroads and had through routes and joint rates and tariffs in large numbers with

steam railroads all over the United States. Congress and the courts and the commissions and the general public all were familiar with interurban electric railroads and dealt with them as a class at this time. So, then, in 1920, when the Transportation Act was passed, the classifications of street, suburban and interurban electric railways had been well settled over a period of twenty years, and the meaning of the term "interurban electric railway" was unambiguous and definite.

By Common Consent and Contemporaneous Construction of Both the Federal and State Authorities, Appellee Has Been Described and Treated as an Interurban Electric Railway.

The appellee has been treated as an interurban electric railway by the regulating commissions of Wisconsin and Illinois for more than 20 years. Those Commissions have assumed jurisdiction over the securities issued by appellee both before and since March 1, 1920, when the Transportation Act was passed. These acts of these state agencies are acts to which full faith and credit should be given under the Constitution and which under the doctrine of comity are entitled to the highest respect. *Cooper v. Newell*, 173 U. S. 555; *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265.

More than $39,000,000 in securities have been issued by the appellee since 1920 under the authority and approval of the regulating commissions of Wisconsin and Illinois and with the knowledge and tacit sanction of the Interstate Commerce Commission. The form of annual report prescribed by that Commission for use by electric railroads requires a rather complete description of the business of such railroads. In the annual reports of appellee to that Commission since 1920 it has shown the character and the par value of securities issued each year under the authority of the state regulating commissions of Wisconsin and Illinois. In its annual report for one of these years appellee,

through inadvertence, failed to show that certain securities were issued under authority of the regulating commissions of Wisconsin and Illinois. An official of the Interstate Commerce Commission called appellee's attention to this omission and asked to be advised of the authority under which these securities therein listed were issued. The appellee responded to this inquiry by advising that the securities were issued under state authority, which satisfied the inquiry.

On two occasions since 1920 the appellee has been advised by a director of one of the bureaus of the Commission that it need not file returns in response to an order of the Commission entered under section 15a unless and until advised to the contrary. The appellee has not been advised to the contrary. (R. 24, 25)

In *Intrastate Fares of the Chicago North Shore & Milwaukee R. R. Within Illinois*, 62 I. C. C. 188, and in *Intrastate Fares of the Chicago North Shore & Milwaukee R. R. in Illinois and Wisconsin*, 136 I. C. C. 165, the Interstate Commerce Commission described the appellee as an interurban electric railway. These cases arose on applications of the appellee under section 13 of the Act which authorizes "any carrier concerned" without other qualifications to file a petition with the Commission involving its power to remove unjust discrimination against interstate commerce. In the first of these cases the State of Illinois through its Attorney General seriously contended that the appellee was a street railway and on that account was without authority to file a petition with the Interstate Commerce Commission under section 13. This contention was overruled by the Commission, which held that the appellee was a carrier by railroad as that term is used in section 13 and certain other provisions of the Act.

Commencing with the year 1921 in its Thirty-Fifth Annual Report, the Commission has pointed out to Congress that some difficulty had arisen in the construction of sec-

tion 20a, in its application to electric lines, and said that it had no jurisdiction over the issuance of securities of street, suburban or interurban electric railroads which were not operated as a part of a general steam railroad system of transportation, whereas an independently operated interurban electric railroad if engaged in the general transportation of freight is subject to section 15a.

In its annual report to Congress for the year 1921 the Commission said:

> "We have no jurisdiction over the issuance of securities of a 'street, suburban, or interurban electric railway' which is not operated as a part of a general steam railroad system of transportation"

and in that report the Commission also said that certain electric railroads independently operated are engaged in the transportation of freight in interstate commerce in addition to the transportation of passengers. In its annual report for the year 1929 the Commission made the following comment and recommendation:

> "In our annual report to the Congress for various years since the enactment of the amendments of 1920, we have recommended that section 20a, relating to the issuance of securities, *be so amended as to apply to electric railway companies engaged in the general transportation of freight.*"

In the same annual report the Commission concluded its discussion of this question by recommending that the provisions of section 1 (22), section 15a (1), and section 20a (1), applicable to electric railways

> "be amended by substituting provisions exempting all electric railways except such as interchange standard freight equipment with steam railways and participate in through interstate freight rates with such carriers."

These statements and recommendations repeated in the annual reports of the Commission to Congress since 1921 constitute a contemporaneous construction of section 20a which accords with the construction relied upon by the appellee and is an admission by the tribunal charged with the administration of section 20a that independently operated electric lines which interchange standard freight equipment with steam railroads and which participate in through interstate freight rates with such railroads and are engaged in the general transportation of freight are not subject to section 20a.

In *Proposed Acquisition of Cincinnati Hamilton & Dayton Rwy. Co.*, 154 I. C. C. 603, the Commission held that the electric line there before it, which operated between Cincinnati and Toledo via Dayton, Springfield and other points in Ohio with aggregate trackage exceeding that of the appellee, was an interurban electric railway not subject to section 1 (22) or section 20a. This carrier engaged in freight business to a much larger extent than does the appellee. In other cases the Commission made similar findings as to other carriers whose characteristics are substantially the same as the appellee.

In *Wallower v. United States*, 32 Fed. (2) 524, the three judge court held that the Southwest Missouri Railroad, an electric line the principal traffic of which was freight, was an interurban electric railway not subject to section 1 (22) of the Interstate Commerce Act.

The contemporaneous construction given section 20a by the Commission over a period of 12 years is entitled to great weight. *United States v. Minnesota*, 270 U. S. 181; *Logan v. Davis*, 233 U. S. 613.

In *Maynard v. Elliott*, 283 U. S. 273, in commenting on the construction of a statute by courts and by the public over a long period of time, and where the Circuit Court of Appeals had given a different construction of far-reaching and serious results, this Court in adhering to the long-established construction said

> "Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally accepted, especially where overturning the established practice would have such far reaching consequence as in the present instance."

In the instant case the construction of the statute applied by the regulatory commissions of Wisconsin and Illinois and by the Interstate Commerce Commission is the construction given the statute by the entire electric railway industry, by bankers, by investment companies, by the general public and others who have dealt in the securities of electric railways. Should that construction be rejected by the Court in this case its action would have far reaching consequences of a very serious character, and the result would be injurious to the appellee.

In Enacting the Legislation of 1920 Congress Knew that Interurban Electric Railways Would be Subject to all the Provisions Thereof Unless Specifically Excluded. Therefore It Excluded Such Railroads From Certain of the New Provisions Because They Were Not Within the Purpose Served or the Mischief Sought to be Corrected.

As prior to and since the decision of this Court in the *Omaha & Council Bluffs Street Railway case*, 230 U. S. 324, made in June, 1913, interurban electric railroads as distinguished from street railroads have been held to be subject to the Interstate Commerce Act, Congress knew in enacting the comprehensive legislation of 1920 that that class of electric lines would be subject to all of the provisions thereof that relate to common carriers by railroad unless specifically excluded.

As a matter of fact the language of the original House Bill, H. R. 10453, from which the Transportation Act of 1920 ensued contained the following language relating to the issuance of securities by carriers:

> "That from and after one hundred and twenty days after this section takes effect it shall be unlawful for any common carrier by railroad (except a street or electric *interurban passenger railway not engaged in the general business of transporting freight* in addition to its passenger and express business) which is subject to this Act (hereinafter in this section called 'carrier') to issue any * * * securities * * *."

The House of Representatives adopted the foregoing language, with a slight amendment pertaining to corporations organized to engage in transportation and passed the bill and sent it to conference.

It will thus be noted that the original intention was to include within the jurisdiction of the Interstate Commerce Commission control over the issuance of securities by freight carrying electric interurban railways and to exclude only "electric interurban passenger railways."

However, section 20a as finally enacted by Congress affirmatively eliminated all reference to the inclusion of freight carrying interurban electric railroads and this was done despite the fact that the bill as originally passed by the House as above quoted contained direct reference to such railways. Moreover, the Transportation Act as finally passed contained in section 15a and in other sections specific mention of freight carrying electric interurban railways.

The legal history of the meaning of the phrase "interurban electric railway" demonstrates that they did not fall within the purpose sought to be reached by the new legislation or the mischief sought to be corrected. On that account Congress excluded that class of railroad from certain of the amendments by adopting language which had the sanction of time and common usage.

In giving the Commission control over the issuance of securities, Congress was thinking in terms of steam railroads. There can be no question about that. It was well known at the time that investigations by the Commission of the financial affairs of certain important trunk lines had

disclosed conditions which were deemed to be contrary to the public interest. *Financial Investigation New York, New Haven & Hartford,* 31 I. C. C. 32; *St. Louis & San Francisco Railroad Investigation,* 29 I. C. C. 139; *Pere Marquette & C. H. & D. Rwy. Co. Investigation,* 44 I. C. C. 1. It was also well known that many, if not most, trunk line steam railroads operated through several states and that the exercise of authority by several states over the issuance of securities of such carriers was not only cumbersome and expensive but was inadequate and resulted in delay, uncertainty and a total absence of uniform treatment. It will thus be seen that the reason for federal control over the securities of steam railroads did not exist as to independently operated electric railroads. Before the Interstate Commerce Commission was given control over securities, railroads like the Santa Fe, for example, might be obliged to obtain the approval of the regulating tribunals of nine states each time they issued securities. The situation with respect to interurban electric railroads was and is entirely different. Most of them, like the appellee, perform an interurban or intercity service consisting principally of passenger traffic and as to them the state authority over securities is both efficient and adequate.

During the past twelve years since the enactment of section 20a, the Commission has apparently accepted this view, because until this suit was instituted by the government at its request the official and unofficial acts of the Commission were in accordance with it.

Appellee is Clearly Distinguishable From the Piedmont & Northern Railway.

The physical and traffic characteristics of the appellee clearly distinguish it from the Piedmont & Northern Railway which was before the Court in *Piedmont & Northern Rwy. Co. v. I. C. C.,* 286 U. S. 299, where the Court con-

strued the meaning of paragraphs 18 to 22, of section 1 of the Interstate Commerce Act which have to do with the extension and abandonment of lines of railroad. On the facts of that case, the Court held that the Piedmont & Northern is not an interurban electric railway as that phrase is used in section 1. The Court did not lay down any general rule as to what constitutes an interurban electric railway within the meaning of section 1 or other sections of the law. After making certain observations to the effect that the phrase "interurban electric railway" was not in 1920 commonly used to designate a carrier whose major activity was the transportation of interstate freight in trains of standard freight cars, and that the business of the Piedmont & Northern is preeminently interchange interstate freight of national character in all essential respects conducted as the business of steam freight carriers in the territory served, the Court concluded that the Piedmont & Northern, which fitted that description, is not an interurban electric railway.

The Court also pointed out that prior to 1920 street and suburban electric railways had grown in many instances so as to link distant communities; that the interurban lines were constructed to serve two or more cities; that the characteristics of street or suburban railways persisted in these interurban lines; that they were chiefly devoted to passenger traffic and operated single or series self-propelled cars; and that many of them carried package freight and mail and some carried carload freight. The history, the physical, and the traffic characteristics of the appellee fit that description to a nicety.

The distinction between the appellee and the Piedmont & Northern is at once apparent when the physical and traffic characteristics of each are contrasted.

In 1929 the freight revenues of the Piedmont & Northern were 94.5 per cent of its total revenues while the freight revenues of appellee were 22 per cent of its total revenues.

The passenger revenues of the Piedmont & Northern were 2.9 per cent of its total revenues while the passenger revenues of the appellee were 78 per cent of its total revenues.

Of the freight revenues of the Piedmont & Northern 95.7 per cent consisted of interchange freight with steam railroads while the interchange freight revenues of the appellee were 34.74 per cent of its total freight revenues (R. 35) and included in that percentage are revenues from freight interchanged with other electric lines as well as steam railroads.

The revenues from local freight of the Piedmont & Northern were 4.3 per cent of its total freight revenues while the revenues from local freight of the appellee were 65.26 per cent of its total freight revenues.

The interchange freight revenues of the Piedmont & Northern were 90 per cent of its total revenues while the revenues from interchange freight of the appellee were 8.47 per cent of its total revenues. In 1928 Class 1 steam railroads derived more than 65.14 per cent of their total revenues from the transportation of interchange freight. (R. 60, 61)

The Piedmont & Northern interchanged with steam railroads an average of 6,000 carloads of freight per month, while the appellee interchanged with steam railroads an average of about 1900 carloads of freight per month (R. 37). Translated into an average daily movement, this means for the appellee less than 32 cars received and 32 cars delivered each day.

The revenues of the appellee from carload freight were 8.63 per cent of its total revenues while the revenues of the Piedmont & Northern from carload freight constituted the major part of its total revenues.

Of the total miles of track of the Piedmont & Northern, only 2.9 miles are located in city streets while approx-

imately 40 miles of the track of appellee are located in city streets. The Piedmont & Northern has 2.25 per cent of its total miles of track located in city streets while the appellee has 14.66 per cent of its total *route* miles of track in city streets.

The Piedmont & Northern handles standard freight equipment over substantially every mile of its track, while on 31.47 route miles of appellee's track, which is 22.73 per cent of its total route mileage, it is impossible to handle carload freight in standard railroad freight equipment. Appellee cannot handle standard railroad equipment in either its Milwaukee or Chicago terminals.

The Piedmont & Northern owns 17 electric locomotives weighing from 55 to 100 tons each, while the appellee owns but 7 electric locomotives, the heaviest of which is 70 tons, and two of which are operated by electric storage batteries.

The maximum grades on the Piedmont & Northern are 1 per cent and are compensated for curvature while there are maximum grades up to 7 per cent on the main line tracks of the appellee.

The Piedmont & Northern owns 287 freight cars, all of which are interchanged with steam railroads, while the appellee owns 206 freight cars only 114 of which can be interchanged with steam railroads.

The Piedmont & Northern operates a freight yard as a joint facility with two steam railroads, while the appellee has no joint facility operations with any steam railroad.

The Piedmont & Northern maintains a regular Pullman schedule in connection with the Seaboard Air Line, a steam railroad, while the appellee operates no through passenger service of any kind with any steam railroad. None of its passenger equipment is interchanged with steam railroads; and it would be physically impossible to handle standard steam railroad equipment either passenger or freight into either of appellee's terminals at Chicago or Milwaukee.

The appellee is an associate member of the American

Note: Data as to Piedmont & Northern from *Piedmont & Northern v. U. S.*, 286 U. S. 299 and *Construction Piedmont & Northern*, 138 I. C. C. 363.

Railway Association and a member of certain other associations which are maintained largely by steam railroads. Membership in these organizations is necessary or desirable in the case of an interurban electric railway if it has any interchange connections with steam railroads.

By powers of attorney filed with the Commission the appellee concurs in numerous freight tariffs with steam and electric railroads similar to those maintained by other interurban electric railroads and steam railroads which do an interline business. The participation by the appellee in interline tariffs is substantially the same as the participation by the Spokane and Inland Empire Railroad in 1911, which this Court described as an interurban electric railroad, and the same as the participation by numerous other interurban electric railroads at the time of the passage of the Transportation Act. The regulations of the Commission require that a carrier which seeks to participate in interline traffic under joint rates must file powers of attorney with it whether or not that carrier actually handles interline business. This character of participation in joint rates facilitates the handling of interline business and it is customary for all railroads which have any interline business to concur in the general tariffs published by certain publishing agents of the steam railroads.

Membership in the associations referred to and concurrence in the interline tariffs lose their significance so far as the appellee is concerned when consideration is given to the fact that less than 2 per cent of its passenger revenues are from interline passenger business and 8.47 per cent of its total revenues are from interline freight.

Aside from these distinguishing contrasts in the physical and traffic characteristics of the appellee and the Piedmont & Northern, the appellee has other distinctive characteristics. It is predominately an interurban or intercity passenger line. It operates interurban and suburban passenger service at frequent intervals between Chicago, Mil-

waukee and intermediate towns and villages. The characteristics of the Bluff City Street Car Line, out of which it developed, have persisted. Its passenger trains and its merchandise dispatch trains between Chicago, Milwaukee and intermediate points are operated in single or series self propelled cars. These trains operate over the elevated structure in Chicago in common with the Chicago Rapid Transit Company, which performs an intramural service within Chicago a distance of 24 miles and such operation is subordinate to the operation of the Chicago Rapid Transit Company and is under the train rules of that company. In Waukegan appellee owns and operates the street car system and has transfer arrangements between the street cars and its interurban service. In Milwaukee the appellee operates over the street car tracks of the Chicago and Milwaukee Electric Railroad, which it owns a distance of about three miles. Appellee handles a comparatively limited number of commodities. Of the 157 commodities listed in the Commission's commodity classification, there are 56 commodities which during the years 1929 and 1930 appellee did not handle. Appellee handles practically no grain, no live stock, no packing house products, no poultry or eggs. It has no grain elevators or stock yards on its line.

The appellee is restricted and handicapped in its operation of freight service on its line of railroad both by physical conditions and franchise requirements under which it operates over city streets in many towns and villages. For example, appellee operates in 14 towns under franchise rights. In all but two of such towns the franchise requires the use of electric power; in all but three towns steam operation is prohibited; in five safety stops are required; in eight appellee must pave the streets; in seven appellee must stop at street intersections; in nine appellee must remove snow; in two appellee must sprinkle the streets; in six freight operation is prohibited; and in five appellee must carry policemen and firemen free of charge. It should be

emphasized that more than 60 per cent of the total freight revenues of the appellee is derived from less than carload merchandise carried in the merchandise dispatch service performed in self-propelled baggage type cars, some of which are trailers. This business is local to appellee's line. Less than 10 per cent of its total revenues comes from local carload business, and from all freight business interchanged with both steam and electric railroads.

In Piedmont & Northern Case the Court Established no Precedent Which Controls Disposition of This Case.

In the *Piedmont & Northern case* the Court appears to have disposed of the question there presented largely on the facts. It held that the Piedmont & Northern is not an interurban electric railway within the meaning of that phrase as used in section 1 (18-22) of the Interstate Commerce Act. Appellant argues that the principle to be deduced from the decision in the *Piedmont & Northern case* is that when the volume of a carrier's interstate business is such as to constitute it an important competitor on substantially equal terms with an interstate steam railroad it falls within the class of carriers "long recognized as objects of national concern and regulation," and as such it would cease to be a street, suburban or interurban electric railroad. We are sure that in the *Piedmont & Northern case* the Court did not intend to lay down any such rule of interpretation. Upon reflection it is at once apparent that if the fact that an electric line is an important competitor of a steam railroad brings it within the class of carriers "long recognized as objects of national concern and regulation" it would follow from that premise that water carriers, motor trucks and busses, which are important and troublesome competitors of steam railroads, would on that account be objects of national concern and regulation. Up to this time trucks, busses and water carriers have not been

objects of national concern and regulation. The appellee competes with motor trucks, busses and water carriers as do most steam railroads.

Appellant states that a carrier does not have to be predominately a freight carrier in order to be a substantial factor in the business of transporting interstate commerce. It then refers to the fact that the gross operating annual revenues of appellee, in particular years, were about $7,000,000, and that the gross operating annual revenues of the Piedmont & Northern were about $2,500,000 apparently for the purpose of suggesting that because the gross revenues of appellee were substantial it is an object of national concern and regulation. In support of this argument appellant cites facts with respect to the Long Island Railroad, not of record, which show that in 1928 that railroad received most of its revenue from passenger traffic. This statement is based on the report of the Commission in *Long Island R. R. Co. Abandonment*, 162 I. C. C. 363. That report shows that the figures used are partly estimates, and that 75 to 80 per cent of the freight traffic of the Long Island was interstate commerce, which means that it was interchanged with other railroads.

It is perfectly obvious that the fact that the gross revenues of appellee in 1929 were substantial and were greater than the gross revenue of the Piedmont & Northern does not support the argument that that makes the appellee an object of national concern and regulation. Poors Manual for 1932 shows that the gross revenue during the year 1929 of the Chicago Rapid Transit Company, which performs a local street car service over the elevated structure in Chicago, was over $21,000,000; that the gross revenue of the Chicago Surface Lines was over $62,000,000; that the gross revenue of the United Railways and Electric Company of Baltimore, performing a street car service was over $16,000,000; that the gross revenue of the St. Louis Public Service Company, a street car system in St. Louis, was over

$19,000,000; and that the gross revenue of the Boston Elevated Railway Company an urban street car system was over $34,000,000. If appellant's argument is sound, these and other street car systems throughout the country which have annual earnings substantially greater than the appellee would also be objects of national concern and regulation. But they are not. This argument falls of its own weight. Appellant is indeed put to extreme lengths to be compelled to resort to it.

That appellee has not been treated by agencies of the federal government as an object of national concern and regulation is apparent from the fact that although the Valuation Act was passed in 1913 and the Commission has made tentative valuations of every steam railroad in the United States, irrespective of size, it has not yet valued the appellee. The appellee has not been an object of national concern as to that question. When in 1920 in *Increased Rates, 1920,* 58 I. C. C. 220, the Commission authorized a general increase in freight and passenger rates, of steam railroads, and prescribed rate groups, it did not include the property of the appellee or other independent electric lines in the valuation used in that case as a means of determining the rate base. Again, in 1922 in *Reduced Rates, 1922,* 68 I. C. C. 676, where the Commission required steam railroads to reduce freight rates approximately 10 per cent and fixed the value of steam railway property as a means of determining the fair return, it did not include the appellee in that value.

In the recent *Fifteen Per Cent Case,* 179 I. C. C. 215 the Commission gave no concern to the value of the appellee or other electric railways. In these three important nation-wide investigations the appellee has not been an object of national concern.

The appellee and other independently operated electric lines were not regarded as objects of national concern in the legislation of Congress dealing with *Railway Mail Pay,*

39 Stat. L. 412, enacted in 1916, and 40 Stat. L. 748, enacted in July, 1918. The Act of 1916 authorized the Commission to fix and determine reasonable rates and compensation for the transportation of mail matter by "railway common carriers". This phrase is certainly broad enough to include all common carriers by railroad, but in *Electric Railway Mail Pay*, 58 I. C. C. 455, certain electric lines appeared before the Commission and sought the benefit of the higher rates of mail pay established by the Commission for steam railroads, the Commission rejected their plea and held that these electric lines were "urban and interurban electric railroads" within the statute of July, 1918, which authorized the Commission to fix rates for the transportation of mail matter by urban and interurban electric common carriers. Thereafter the Commission proceeded to fix lower rates for the transportation of mail matter by electric carriers under the statute of July, 1918, *Electric Railway Mail Pay*, 98 I. C. C. 737. Electric railways were not considered as objects of national concern in these matters.

In its report in *Consolidation of Railroads*, 159 I. C. C. 522, where the Commission adopted a plan for consolidating railroad properties under section 5 of the Interstate Commerce Act, it did not treat appellee or other independent electric lines as objects of national concern by including them in the plan, and this despite the fact that the consolidation provisions of the Act, unlike section 20a, apply to all carriers by railroad.

Appellee is Not a Carrier or Corporation as Those Terms are Used in Section 20a.

In its specification of errors but not elsewhere in its brief the appellant casually suggests that the appellee is subject to section 20a by virtue of that part of paragraph 1 thereof following the parenthetical exception which reads

> "or any corporation organized for the purpose of engaging in transportation by railroad subject to this act".

If the Government's contention is correct in this particular, Congress did a vain and futile thing in attempting to exclude independently operated street, suburban and interurban electric railroads from the provisions of Section 20a. All of the securities that have been issued by appellee were issued after it acquired the property and began the operation thereof as an interurban electric common carrier. The fact that it was incorporated under the General Railroad Law of Illinois with charter powers to conduct a railroad business is beside the point.

As was held by the Court of Appeals of Maryland in dealing with the meaning of Section 20a in *Whitman v. Northern Central Rwy.*, 127 Atl. 113, where the Court referred to the meaning of the word "organized" as used in Section 20a

> "obviously it means more than mere incorporation, and contemplates that the corporation shall have taken such steps as were necessary to enable it to engage in interstate commerce whether it actually did so engage or not."

The obvious meaning of the phrase "or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act" is to give the Commission control over the security issues of a corporation organized to engage in transportation by railroad subject to this Act, before it actually engages as a carrier in such transportation, so that such a corporation could not, prior thereto, issue securities without the authority of the Commission for possible use later in building the railroad and thereby circumvent the intent of Congress. Were it not for that clause, any corporation organized to engage in transportation by railroad could issue securities without the approval

of the Commission before it actually engaged in such transportation and make such use of the securities, if later it actually engaged as a common carrier in transportation, as it saw fit to make.

This is the only logical and reasonable interpretation that can be given this clause, because, as already observed, otherwise the parenthetical exception in respect to street, suburban and interurban electric railroads would have no effect whatever. Many, if not most, interurban electric railroads are incorporated under general railroad laws. This record shows that the Chicago Rapid Transit Company, which performs the intramural urban service over the elevated structure in Chicago was organized under the General Railroad Law of Illinois and, by its charter, has the same powers granted the respondent and the same powers that would be granted any railroad organized under those laws. If the position of the Government is sound on this point, the Chicago Rapid Transit Company is subject to the jurisdiction of the Interstate Commerce Commission in respect to the issuance of securities.

Since 1920 Appellee has Issued Securities Aggregating $39,000,000 Under State Authority and Without the Authority but With the Knowledge and Tacit Sanction of the Interstate Commerce Commission. Aside From the Facts and the Legal Meaning of the Statute, Equity Requires That Decree of Court Below be Affirmed.

Paragraph 11 of section 20a provides that any security issued or any obligation assumed by a carrier subject to that section without the authority of the Interstate Commerce Commission shall be void, and that any such void security acquired by any person for value, in good faith and without notice that it is void, entitles such person to hold the carrier and its directors, officers and attorneys, jointly and severally liable for the full amount of damages sustained in a suit in any court of competent jurisdiction.

There are now pending in the United States District Court for the Northern District of Illinois fifteen suits against the appellee, its directors, officers and attorneys for alleged damages aggregating $325,000. These suits were filed since the stock market crash in the fall of 1929 by purchasers of securities of the appellee and they are grounded on the theory that the plaintiffs are entitled to damages because the securities, having been issued without the authority of the Commission, are void.

As already pointed out, since 1920 the appellee has issued securities in good faith aggregating in par value about $39,000,000. These securities were issued under authority of the regulating commissions of Wisconsin and Illinois and without the authority but with the knowledge and tacit sanction of the Interstate Commerce Commission. Other electric lines similarly situated have issued securities since 1920 aggregating more than $239,000,000, under state authority and without the approval of the Interstate Commerce Commission.

In these circumstances the language of the statute would have to be compelling indeed to cause this Court to disregard the equities of this case and to disregard the established practice of the appellee and the entire electric railway industry, the regulating authorities of all of the states, and the construction given the statute by the Interstate Commerce Commission, which would have to be done if the contentions of appellant be sustained. *Maynard v. Elliott, supra.*

Unlike the *Piedmont & Northern case* the equities of this case are overwhelmingly with appellee. Under the doctrine of relative convenience and injury all doubts in this case should be resolved in favor of appellee. *Montana Copper Company v. United States,* 142 Fed. 625, Sec. 64, 32 Corpus Juris 77. This doctrine is especially applicable in this instance because the reversal of the decree of the lower court will cause great injury to appellee and will confer no benefit upon appellant.

In the *Piedmont & Northern case* the carrier sought to extend its line into a territory already adequately served by steam railroads. The Commission had asserted jurisdiction and had found that the public convenience and necessity did not require the extension. Therefore, what the Piedmont & Northern attempted to do in that case was contrary to the spirit of the amendments to the law of 1920 as expressed by this Court in numerous cases. On the other hand, in the instant case the decree of the court below in no way defeats the purpose of section 20a but is in accord with the plain intent of Congress to exclude from that provision a class of carriers which would otherwise have been included, as this class did not come within the aims of Congress.

Even though the Interstate Commerce Commission, at whose instance this suit was instituted, may believe in the light of its later experience that interurban electric railways which interchange freight in standard equipment and which maintain interline freight rates with steam railroads should in the public interest be included within the provisions of section 20a, there can be no reasonable ground, particularly after its repeated recommendations to Congress and the latter's refusal to act, to apply to the courts for an enlargement of the purpose of the statute. There is no equity and can be no equity in such an effort. If the Commission, as its recommendations to Congress indicate, now believes that section 20a should be amended so as to bring within its scope interurban electric railways which interchange freight with steam railroads in standard freight equipment and which maintain interline freight rates with such railroads, it should continue to look to Congress for such legislation. Statutes cannot be extended by construction to cover *casus omissus*.

While it is not necessary to argue that the particular purpose of section 1 (18-22) of the Interstate Commerce Act construed in the *Piedmont & Northern case* is not the

same as the purpose of section 20a, it is settled that the same phrase may have a different meaning in different connections in the same Act. In the *Piedmont case,* the Court answered some of the contentions of the Piedmont as to the significance of the similarity of phraseology as to electric lines in other sections of the Act by this observation: "But it is so used with other purposes in view." *American Security Co. v. District of Columbia,* 224 U. S. 491, 494; *Alabama Midland Rwy. Co. v. I. C. C.,* 168 U. S. 144. Compare *Wight v. United States,* 167 U. S. 512. In the *Piedmont & Northern case* the Court laid down no rule as to the meaning of the statute there involved. Although it appears that the general objective of section 1 (18-22) and section 20a is the same in scope, yet the particular purpose of these sections is different.

While the prayer of the bill which instituted this suit seeks only an injunction against future issues of securities, allegations are made in the bill that since March 1, 1920, appellee and its predecessor have been subject to the jurisdiction of section 20a and have issued securities aggregating about $39,000,000 without the approval of the Interstate Commerce Commission and that these acts of the appellee violate section 20a. It will thus be seen that a reversal of the decree of the court below will result in great injury to the appellee for even though a decree should be entered limited to enjoining the appellee from the future issue of securities without the approval of the Commission, nevertheless the stigma of doubt would attach to $39,000,000 of securities issued by the carrier prior to the decree and subsequent to March 1, 1920.

It is clear that on the facts and the law, the appellee is an interurban electric railway which falls within the exception in section 20a. It is equally clear that the contentions of the appellant cannot be sustained without doing violence to the equities, which as stated are overwhelmingly with appellee. If appellant's theory of the law be sustained the effect will be to make void the securities

of appellee and of other electric lines, the result of which may be a plethora of law suits for damages which staggers the imagination. In addition, should the Court adopt appellant's theory of the law and hold that the appellee is not an interurban electric railway, such a finding will raise for the appellee and for the whole electric railway industry a fog of uncertainty as to classification and jurisdiction which will make it impossible for any electric railway to know in advance of a decision by this Court what its status is under section 20a, and such a finding will work untold injury to appellee and to the entire electric railway industry.

CONCLUSION.

For the reasons stated the decree of the court below should be affirmed.

Respectfully submitted,

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December 9, 1932.

"Section 20a (1) That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this act."

"Section 20a. (2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * * * * * * * * *

"Sec. 20a. (11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any

term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. If any security so made void or any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the issue or assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which issued the security so made void, or assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents, who participated in any way in the authorizing, issuing, hypothecating, or selling of the security so made void or in the authorizing of the assumption of the obligation or liability so made void. In case any security so made void was directly acquired from the carrier issuing it the holder may at his option rescind the transaction and upon the surrender of the security recover the consideration given therefor. Any director, officer, attorney or agent of the carrier who knowingly assents to or concurs in any issue of securities or assumptions of obligation or liability forbidden by this section, or any sale or other disposition of securities contrary to the provisions of the Commission's order or orders in the premises, or any application not authorized by the Commission of the funds derived by the carrier through such sale or other disposition of such securities, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $1,000 nor more than $10,000, or by imprisonment for not less than one year nor more than three years, or by both such fine and imprisonment, in the discretion of the court." (C. 91, 41 Stat. 494-496; U. S. C. Title 49, Sec. 20a.)